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Message Text

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61
ACTION ARA-20

INFO OCT-01 ISO-00 AID-20 CIAE-00 COME-00 EB-11 FRB-02

INR-10 NSAE-00 RSC-01 TRSE-00 XMB-07 OPIC-12 SPC-03

CIEP-02 LAB-06 SIL-01 OMB-01 NSC-10 SS-20 STR-08

CEA-02 L-03 H-03 PA-04 PRS-01 USIA-15 DRC-01 /164 W
---------- 082504
R 091712Z NOV 73
FM AMEMBASSY BOGOTA
TO SECSTATE WASHDC 127
INFO AMEMBASSY LIMA

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E.O. 11652: N/A
TAGS: EGEN CO
SUBJ: OPIC AND ANDEAN PACT FOREIGN INVESTMENT CODE

REF: BOGOTA A-220 (NOTAL)

1. BEGIN SUMMARY: DISCUSSIONS WITH GOC OFFICIALS ON IMPLICATIONS OF ARTICLE 51 OF ANDEAN PACT FOREIGN INVESTMENT CODE, ESPECIALLY PHRASE PROHIBITING SUBROGATION, HAS SERVED MAINLY TO MAKE THEM AWARE THAT OPIC OPERATIONS IN COLOMBIA REA AFFECTED. THEY NOTE THAT SUBROGATION BY INSURER ALREADY PROVIDED FOR UNDER COLOMBIAN LAW AND SUGGEST THAT THIS BLUNTS IMPACT OF ARTICLE 51. FOREIGN OFFICE WILL INSTITUTE STUDY OF OVERALL RAMIFICATIONS FOR OPIC INSURANCE. END SUMMARY.

2. WE HAVE DISCUSSED RELATIONSHIP BETWEEN OPIC OPERATIONS IN COLOMBIA AND ARTICLE 51 OF ANDEAN PACT FOREIGN INVESTMENT CODE WITH VARIOUS GOC OFFICIALS. APPARENTLY GOC HAS NOT FOCUSED SPECIFICALLY ON THIS PARTICULAR ARTICLE DESPITE HANNA-CHEVRON'S APPROACH TO FONMIN RE ITS SUBSTANTIAL NICKEL MINING PROJECT (REFAIR). AS OPIC AWARE, FONOFFICE CONTINUES TO ADVISE US OF ITS APPROVAL OF INSURANCE IN INDIVIDUAL CASES, AS THOUGH OPIC WERE
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STILL OPERATING NORMALLY HERE.

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3. ONCE APPRISED OF PROBLEMS POSED BY ARTICLE 51, OFFICIALS HESITANT TO INTERPRET IT. THEY UNIFORMLY ASSERT THAT COLOMBIA'S RECORD OF FAIR TREATMENT TO FOREIGN INVESTORS MAKES APPLICATION OF ARTICLE 51 SOMEWHAT ACADEMIC HERE. AS FOR DEFINITIVE INTER-PRETATION DISCREPANCIES TO ANDEAN COMMISSION, ITS MEMBERS WOULD HAVE TO OPERATE BY PERSUASION AND PROBABLY COULD NOT ISSUE BINDING DECISION. FORMATION OF ANDEAN COURT WITH STRONGER AUTHORITY UNDER CONSIDERATION BUT NOT YET SETTLED.

4. WITH REF TO TEXT OF ARTICLE, ON OFFICIAL SUGGESTED THAT AR-BITRATION OF POSSIBLE CONTROVERSIES WOULD BE ACCEPTABLE, BUT HE LESS CLEAR THAT IT COULD BE INTERNATIONAL RATHER THAN INTERNAL ARBITRATION OR THAT IT COULD BE PROVIDED FOR IN ADVANCE IN INVESTMENT CONTRACT. OTHERS REJECTED IDEA OF INTERNATIONAL ARBITRATION OUT OF HAND.

5. OFFICIALS AGREED THAT UNDER COLOMBIAN LAW, INSURER, WHETHER OPIC OR ANY OTHER THAT HAS PAID CLAIM TO ITS INSURED, IS SUBROGATED TO INSURED'S CLAIM AGAINST THIRD PARTIES. THEREFORE THEY CONCLUDE THAT IN SUCH AN EVENT OPIC COULD PURSUE ITS CLAIMS THROUGH COLOMBIAN LEGAL SYSTEM REGARDLESS OF WHETHER INVESTMENT CONTRACT CONTAINED SUBROGATION CLAUSE. ONE POSSIBILITY RAISED WAS EXCHANGE OF LETTERS, ONE FROM GOC EXPLAINING SUBROGATION RIGHTS IN COLOMBIA AND ACKNOWLEDGEMENT ON BEHALF OF OPIC, FOR PURPOSE OF GIVING OPIC NECESSARY ASSURANCE FO IT TO OPERATE HERE.

6. SOME OTHER INTERPRETIVE POINTS WERE RAISED, WHICH SEEM TO US AS PERHAPS LESS PROMISING. ONE IS WHETHER LOANS ARE DISTINCT FROM INVESTMENTS AND THUS NOT SUBJECT TO ARTICLE 51. ANOTHER IS WHETHER QTE INSTRUMENT UNQTE AS USED IN ARTICLE 51 REFERS ONLY TO CONTRACT WITH INVESTOR OR IS BROAD ENOUGH TO INCLUDE BI-LATERAL AGREEMENTS BETWEN GOVERNMENTS.

7. FONOFFICE HAS PROMISED TO INSTITUTE GOC CONSIDERATION OF INTERPRETATION AND IMPACT OF ARTICLE 51, INCLUDING POINTS ENUMERATED IN PRECEDING PARAS. WE SUSPECT SOMETHING SIMILAR TO PARA 5 COULD EMERGE FROM THIS STUDY. EMB WOULD WELCOME ANY REACTION FROM WASHINGTON TO THESE PRELIMINARY DEVELOPMENTS.
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Disposition Action: RELEASED
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Disposition Date: 28 MAY 2004
Disposition Event:
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